PP

v.

OTHMAN A AZIZ

HIGH COURT MALAYA, ALOR SETAR
MOHD ZAKI WAHAB JC
[CRIMINAL TRIAL NO: 45B-41-10-2011]
25 AUGUST 2012

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Accused's unsworn statement from dock - Defence of - Unsoundness of mind - Whether evidence adduced considered in totality - Whether confession voluntarily made - Failure to cross-examine witness - Whether evidence deemed to be admitted - Whether accused had intention to cause death - Whether defence of unsoundness of mind established - Whether accused raised doubt in prosecution's case - Whether defence of sudden and grave provocation established*

CRIMINAL LAW: *Penal Code, s. 84 - Unsoundness of mind - Accused charged for murder - Whether accused bears legal burden to prove defence - Whether accused's unsworn statement that he did not realise what happened could prove his unsoundness of mind - Evidence Act 1950, s. 105*

CRIMINAL PROCEDURE: *Accused - Unsworn statement from dock - Accused charged for murder - Whether unsworn statement admissible as evidence - Whether ought to be considered in light of other evidence - Criminal Procedure Code, s. 182*

EVIDENCE: *Confession - Admissibility of - Whether defence raised objection as to voluntariness of confession - Whether material evidence to support prosecution's case - Failure to cross-examine witness on material evidence - Whether evidence deemed to be admitted - Evidence Act 1950, s. 24*

EVIDENCE: *Cross-examination - Failure to cross-examine prosecution's witness - Whether material evidence deemed to be admitted*

The accused was charged for murder of one Ratna Suffizahriyanti ('deceased'), an offence punishable under s. 302 of the Penal Code. The accused was working as a cook for one Haji Abdul Halim ('SP9') and around midnight on the material day when the

offence was alleged to have taken place, the accused told SP9 that he had murdered the deceased in his room. After being advised by SP9, the accused willingly followed SP9 to the police station and thereafter, the police was guided by the accused to his room where the deceased's body was found. The said body was then sent for post-mortem which was conducted by Dr. Suhani ('SP4'). Eventually, when SP9 came to visit the accused in the lock-up, the accused told SP9 that he had killed the deceased after being told by the latter that she was not going to marry him. In his defence, the accused opted to give unsworn statement from the dock and explained that when the deceased informed him that she was not going to going to marry him, the accused lost all his senses. From that moment on, he did not realise what actually happened. After having recovered his senses, the accused found the deceased was already on the floor, bleeding and breathless. In light of this, the accused raised the defence of unsoundness of mind at the time of commission of the murder. Since the accused's defence rested purely on his unsworn statement, the issues that arose for consideration was, (i) whether a doubt could be raised in the prosecution's case; and (ii) whether a defence of sudden and grave provocation could be established.

Held (convicting accused for murder and sentencing him to death):

(1) In dealing with unsworn statement, a judge or magistrate, in evaluating the evidence, must not brush aside the unsworn statement and proceed to make a finding of guilt. The trial court must consider the accused's defence as contained in the unsworn statement in light of other evidence tendered by the prosecution. At the end of any criminal trial, the whole evidence produced in the case must be considered in its totality. (para 45)

(2) There were neither eyewitness who had seen the accused's act in causing the deceased's death nor any other direct evidence which proved that he caused the death. Under the circumstances, the prosecution had to rely on indirect or circumstantial evidence to secure a conviction against the accused. The circumstantial evidence that proves the accused's guilt must be consistent and complete to show that the

accused alone had committed or carried out an act or several acts that had caused the deceased's death. On the facts, this court found evidence of circumstances which had proved the nexus between the accused and the deceased's death. (paras 19, 22 & 23)

(3) A confession could be admitted under s. 24 of the Evidence Act 1950 ('the Act') if it was proved to be made voluntarily. The confessions made by the accused to SP9 were admissible because (i) there was no objection raised by the defence as to their voluntariness; and (ii) there was no evidence that tends to show that the confessions were not voluntarily made to SP9. The confessions made were material evidence which tends to support the prosecution's case that the accused had killed the deceased. Being important evidence, the defence however failed to cross-examine SP9 on these confessions. That being the case, it is the rule of evidence that the defence was deemed to admit material evidence by his failure to cross-examine witness on the material evidence. (paras 25 & 26)

(4) The circumstantial evidence that existed were subjected to a maximum evaluation and these circumstances, when taken together, had led to only one possible conclusion, namely, the accused was the one who had inflicted the stab wounds and slash wounds on the deceased's body that caused her death. (para 28)

(5) It was not possible to prove the intention of an accused to commit a crime by direct evidence. As such, the intention of an accused in committing a crime had to be inferred from the circumstances surrounding the crime. In any murder trial, the types, number and nature of injuries inflicted on the deceased's body may be considered in inferring the intention of the person so charged to commit murder. On the facts, from the number and nature of injuries found by SP4, it was safe to infer that the accused had the intention to cause the deceased's death. (paras 30, 31 & 33)

(6) The defence of unsoundness of mind is one of the general defences provided under s. 84 of the Penal Code. Once raised, it becomes the duty of the accused, who bears the legal burden, to prove his defence as provided under s. 105 of the Act. On the facts, the defence had not produced any evidence which showed that he was of unsound mind at the material time. A mere statement in the accused's unsworn statement that he did not realise what actually happened could not by a stretch of imagination amount to evidence to prove he was of unsound mind at the particular time. Hence, the court could not find an iota of evidence which proved the status of the accused's mental capacity at the time when he stabbed and slashed the deceased. On the totality of the evidence, the accused had failed to prove his defence of unsoundness of mind. (paras 47, 48, 53, 54 & 57)

(7) The accused's unsworn statement was not enough to prove the defence of sudden and grave provocation. A mere refusal to go through with the planned marriage would not constitute such a defence. The said refusal might have provoked a reaction from the accused but not to the extent of committing a murder. It might require something more serious to turn that spurn into a provocation. Having considered the accused's unsworn statement, the court was of the view that his statement did not possess a high quality evidence to succeed in raising doubt to the prosecution's case. (paras 56 & 59)

Case(s) referred to:

Ahmad Faizal Ali Aulad Ali & Ors v. PP [2009] 9 CLJ 745 HC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Dato Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
John Nyumbei v. PP [2007] 2 CLJ 509 CA ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Kishore Chand v. State of HP AIR 1990 SC 2140 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
PP v. Arokiasamy Alphonso [2012] 6 CLJ 117 CA ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Chong Soon Wah [2008] 9 CLJ 153 HC ***(foll)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhammad Rasid Hashim [2011] 3 CLJ 424 HC ***(refd)***
PP v. Salleh Zakaria & Anor [2010] 4 CLJ 671 CA ***(refd)***
PP v. Sanin Othman [2011] 1 CLJ 626 CA ***(refd)***

PP v. Shariff Kader [1997] 5 CLJ 463 HC ***(not foll)***
Teuku Nawardin Syamsuar v. PP [2011] 3 CLJ 353 FC ***(foll)***
Wong Heng Fatt v. PP [1958] 1 LNS 96 HC ***(not foll)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(m), 182
Evidence Act 1950, ss. 24, 105
Penal Code, ss. 84, 299, 300, 302, 304

For the prosecution - Wan Nor Hasnita Wan Daud; DPP
For the accused - AJ Surinarayanam; M/s Suri & Co

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zaki Wahab JC:

The Charge

[1] The accused was charged with an offence under s. 302 of the Penal Code. The charge against him is as follows:

> Bahawa kamu pada 2 Mei 2011 antara jam lebih kurang 8.45 malam hingga 3 Mei 2011 jam lebih kurang 12.45 pagi, bertempat di dalam bilik No. G 12, di sebuah rumah No 1926H, Taman Mahkota, Jalan Stadium, Alor Setar, di dalam daerah Kota Setar, dalam Negeri Kedah Darulaman, telah melakukan pembunuhan dengan melakukan perbuatan yang menyebabkan kematian ke atas Ratna Suffizahriyanti binti Omar (No KP; 880705-26-5534). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Prosecution Case

[2] The prosecution called ten witnesses to prove the case against the accused. Briefly, the prosecution brought in evidence to show that a women, Ratna Suffizahriyanti binti Omar (IC No. 880705-26-5534) was found dead in room No. G12, house no. 1926H, Taman Mahkota, Jalan Stadium, Alor Setar on 3 May 2011. The body was found by a police team who went to the room acting upon a police report lodged by the accused himself. The room, where the dead body was found, was actually occupied by the accused.

[3] The facts led by the prosecution showed that the accused worked as a cook at D'Suasana Restaurant, owned by Haji Abdul Halim bin Osman (SP9). Usually, the accused will be working daily at the restaurant until midnight. He was provided with a room to stay by his employer. The room in which the body was found was rented by SP9 for the accused to occupy.

[4] On 2 May 2011 the accused worked as usual. However at around 9pm, the accused requested permission of SP9 to return to his room, which permission SP9 granted. He then went off to his room. At about 12 to 12.30 midnight, on 3 May 2011 the accused returned to the restaurant. According to SP9 he was about to close the business for the day when the accused came in. The accused looked confused and agitated, as though he was having a problem. On arrival he approached SP9.

[5] SP9 took him to a table, tried to calm him down. SP9 then talked to him and asked him of his problem. The accused told SP9 that he had committed a crime, that he had murdered someone in his room. The accused then had with him a bag and a photo frame. He pointed to SP9 a photograph of a woman in the photo frame and stated that he had murdered her. He also told SP9 that he had with him the deceased's personal belonging and a knife he used to kill the deceased in the bag. He wanted to show the knife to SP9. However SP9 refused to see the knife.

[6] On hearing the accused narrative, SP9 advised the accused to surrender himself to the police, to which the accused readily agreed. SP9 then took the accused together with the bag and the photo frame to Alor Setar Police Station. On arrival at the station, the accused lodged a police report, informing police on duty, Corporal Mohd Rizal (SP5), of the incident. The accused also surrendered the bag that contained the deceased's personal belonging and knife to SP5. SP5 later relayed the information to the Investigation Officer on duty, Insp. Johari bin Yahya (SP8).

[7] SP8 thereafter came to the police station and had a short interview with the accused before proceeding to the accused's room. The accused together with SP9 followed him. On arrival at the room, SP8 saw the body of the deceased lying on the floor, wrapped with a blanket.

[8] The body was later sent to Sultanah Bahiyah Hospital, where she was declared dead. Post mortem examination on the body was conducted on the next morning by Dr. Suhani bin Mohd Noor (SP4).

Prima Facie Case

[9] That above is essentially the case for the prosecution and upon conclusion of the prosecution case had argued that a *prima facie* case has been made out and that the accused should be called to enter his defence. Now, it is trite law that the prosecution had the duty to prove a *prima facie* case against the accused at the end of the case for the prosecution. The burden placed on the prosecution and the meaning of a *prima facie* case had been clearly explained in a plethora of cases. In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 the Court of Appeal explained the burden to be proved by the prosecution at the end the prosecution case as follows:

> It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

[10] In *Balachandran v. PP* [2005] 1 CLJ 85, the Federal Court explained that:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal ...
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> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense

A as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

B **[11]** It is clear from decided authorities, including the two cases that I have referred to above, that procedurally, the prosecution must produce evidence to discharge the burden of proof of a *prima facie* case. The evidence adduced not only must be admissible but also believable evidence. It follows therefore that no C *prima facie* case can be made out if the prosecution relies on evidence that is inadmissible. Similarly, there would not be sufficient evidence to prove a *prima facie* case if the prosecution only produce admissible evidence but that evidence cannot be believed at all.

D **[12]** It is also axiomatic that the court, at the end of the prosecution's case, must undertake a proper evaluation of the admissible and believable evidence in order to decide whether a *prima facie* case has been made out. At this juncture, in my E judgment, from the reading of decided authorities, the evidence must prove all the ingredients of the offence charged against the accused (see the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

F **Ingredients Of The Offence**

[13] The accused was charged for an offence of murder under s. 302 of the Penal Code. The prosecution must produce evidence to sufficiently show: firstly, the accused had committed the *actus reus*, by causing the death of the deceased (culpable G homicide); and secondly, that the accused had caused the death with sufficient mental element – *mens rea*.

[14] What constitute culpable homicide has been defined under s. 299 of the Penal Code, which provides:

H Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

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[15] The main ingredients under s. 299 are the death of a person as the result of the act or acts of the accused. Therefore the prosecution must prove the accused had, by doing an act or by doing several acts closely connected, caused the death of the deceased.

[16] As stated earlier the *actus reus* alone is insufficient. The prosecution also had a further duty to prove mental elements of the accused in causing the death of the deceased. This was provided for under s. 300 of the Penal Code. The act or several acts of the accused that caused the deceased's death must fall within any limb of s. 300 of the Penal Code. Section 300 of the Penal Code provide as follows:

Section 300. Murder

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[17] In the charge framed against the accused, the deceased was said to be a woman named Ratna Suffizahriyanti binti Omar. Consequently, it is very important for the prosecution to prove the deceased person was the person named in the charge. Basically the prosecution must bring evidence to prove identity of the deceased. The prosecution called SP1, said to be the mother of Ratna Suffizahrayanti binti Omar to prove identity of the deceased.

SP1 had in her evidence, clearly identified the deceased as Ratna Suffizahriyanti binti Omar, through the photographs shown to her. The evidence also showed that she had identified the deceased as Ratna Suffizahriyanti before a post mortem was performed on her body.

[18] The defence had not challenged these pieces of evidence. Besides SP1's evidence, the prosecution had also brought in the evidence that the body was identified as the deceased by police officer, before the post-mortem examination performed by SP4. I am satisfied the deceased in this case was a woman named Ratna Suffizahriyanti binti Omar, as stated in the charge.

[19] The next fact that must be proved by the prosecution was the very act or several acts of the accused that caused the death of the deceased. Essentially, there was neither eyewitness who had seen the act of the accused in causing the death of the deceased, nor any other direct evidence that proved that the accused caused the death. Under the circumstances, the prosecution has had to rely on indirect or circumstantial evidence to secure conviction against the accused.

[20] The law on circumstantial evidence is clear. In *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, the Federal Court made the following pertinent statements which has stood the test of times:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v. PP* [1982] 2 MLJ 306, 310).

[21] In *Magendran Mohan v. PP* [2011] 1 CLJ 805, the Federal Court discussed the status of circumstantial evidence and in the process adopted the decision of the Indian Supreme Court in *Kishore Chand v. State of HP* AIR 1990 SC 2140 which said:

> The entire prosecution case rested on circumstantial evidence ...
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> The question, therefore, is whether the prosecution proved the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the

> conclusion of the guilt is to be drawn should be fully and cogently established. ... The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. ... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. ...
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> ... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused ...
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> ... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

[22] It is clear from the cases cited above that the circumstantial evidence that proves the guilt of the accused must be fully established by the prosecution. Such evidence must be consistent and complete to show that the accused alone had committed or carried out an act or several acts that had caused the death of the deceased. In *Magendran Mohan v. PP (supra)* the Federal Court ordered an acquittal of the appellant, having satisfied that the circumstantial evidence in the case was not sufficient to convict him.

[23] In the present case, having carefully examined the evidence before me, I found the following evidence of circumstances that proved the nexus between the accused and the death of the deceased. The evidence are as follows:

(a) The dead body was found in a room where the accused had been living. It was also established that he lived there alone.

(b) The accused asked permission from his employer, SP9 to return to his room early on the day of incident. The accused did return to his room after being permitted to do so by SP9. The accused later came back to the restaurant on that late night showing signs of having a big trouble in his mind.

(c) The accused later confessed to SP9 of committing the murder. The accused even showed to SP9 the deceased photograph in a frame which he carried along to the restaurant.

(d) The accused also carried along a bag on his return to the restaurant. He told SP9 there were personal belongings of the deceased inside the bag. The accused also wanted to show to SP9 a knife that he said was used to stab the deceased.

(e) The accused had willingly followed SP9 to Alor Setar's Police Station, where he himself lodged a police report. He later guided police to the room where the dead body was found.

(f) The accused again told SP9 he killed the deceased after being told by the deceased she is not going to marry him. This statement was made to SP9 when SP9 visited him in the lock up.

[24] The evidence clearly showed SP9 heard the confession of the accused killing the deceased, in two occasions: firstly, on the very night itself, upon the accused returning to the restaurant. Secondly the accused confessed to SP9 of murdering the deceased when SP9 visited him in the lock up.

[25] A confession could be admitted under s. 24 of the Evidence Act 1950 if it was proved to be made voluntarily. In the present case I found the confessions are admissible for two reasons. Firstly, there was no objection raised by the defence as to their voluntariness, therefore it is safe to make a finding that the confession was made voluntarily. Secondly, having scrutinised the evidence, I found that there was no evidence, in my judgment, that tends to show that the confession was not voluntarily made by the accused to SP9.

[26] These confessions are material evidence that tend to support the prosecution's case that the accused had killed the deceased. Being important evidence, the defence counsel should have cross-examined SP9 on this aspect. However, counsel for the accused had not, for reasons which are unclear to me, cross-examined SP9 on these confessions. That being the case it is the rule of evidence that the defence is deemed to admit material evidence by his failure to cross-examine witness on the material evidence (see *Wong Swee Chin v. PP* [1980] 1 LNS 138.

[27] The defence however has, actually raised an argument as regard to the confession made by the accused to SP9 in the lock up. It was canvassed before me that that piece of evidence was not admissible for being hearsay evidence. With due respect to the defence counsel, that argument has no basis, for it ignores the very basic underpinning of the hearsay rule. It is to be noted that SP9 related in his evidence on what he had heard directly from the accused. The confession was not heard by SP9 from any third party. He had heard them directly from the accused. The evidence could not be said to be hearsay evidence when it was heard directly from the person who said it.

[28] I had fully considered the circumstantial evidence that existed in this case. I had subjected them to a maximum evaluation. I found that these circumstances, when taken together, had led to only one possible conclusion, namely that the accused was the one who had inflicted the stab wounds and slash wounds on the deceased body that caused her death.

[29] Having found the accused had caused the death of the deceased, I now had to consider the "*mens rea*" of the accused in causing the death. The question I should ask is "whether the act of the accused fall within one of the four limbs stated under s. 300 of the Penal Code"?

[30] In the circumstances of this case, I accept that it is not possible to prove the intention of an accused to commit a crime by direct evidence. As such the intention of an accused in committing crime had to be inferred from the circumstances surrounding the crime. (see *PP v. Salleh Zakaria & Anor* [2010] 4 CLJ 671, *PP v. Badrulsham Baharom* [1987] 1 LNS 72).

[31] In any murder trial, the types, number and nature of injuries inflicted on the deceased body may be considered in inferring the intention of the person so charged to commit murder. In *PP v. Sanin Othman* [2011] 1 CLJ 626 Suriyadi JCA said at p. 640:

> [19] Since it is no easy task to establish the ingredient of intention it thus has to be established by inferences arrived at from the evidence made available. The evidence before the court was more than ample to establish that ingredient. To reiterate, the two injuries were caused by a dangerous instrument ie, a knife. The injuries were deep and never mere slash wounds. With such

A wounds, which must have required great force, it would defy logic that the respondent did not intend to kill or cause serious injury on the deceased *(Tan Buck Tee v. PP)*.

[32] SP4, the Forensic Pathologist who had performed the post mortem on the body testified that he had found 26 stab wounds and four slash wounds on the deceased body. Most of the stab wounds were found on the thorax area, and mostly on the chest and the back. Some of the wounds penetrated the deceased's vital organs and these caused the deceased's death. SP4 concluded that the death was caused by stab wounds injuries on her thorax. SP4 also said the injuries were neither possible to be self inflicted nor could the injuries be accidentally inflicted.

[33] From the evidence of the number of injuries and the nature of injuries found by SP4, it is safe to infer that the accused had the intention to cause death to the deceased when he committed the act of stabbing and slashing the deceased.

[34] On the totality of the evidence I found that the prosecution had made out a *prima facie* case against the accused for an offence punishable under s. 302 of the Penal Code. I therefore ordered the accused to enter his defence against the charge.

The Defence Of The Accused

[35] The accused opted to give unsworn statement from the dock. Thus he cannot be subjected to cross-examination by the prosecution for whatever statement he made from the dock. In his statement the accused explained that he had known the deceased for a long time. They were in a relationship and had planned to marry. Initially the marriage was supposed to take place in April, but it did not materialise. On the night of the incident, the accused admitted to meeting the deceased. Prior to the meeting the deceased called him and informed him that she will be coming to his room. Despite his attempt to stop the deceased from coming to his room, the deceased arrived at his room at around 9 o'clock.

[36] The accused did not deny he had sought permission from SP9 to return to his room. He then met the deceased in his room and had a conversation with the deceased until the stage where the deceased told him she has decided that she was not going

through with the marriage. This, according to the accused, upset him so much as he had left behind his family and moved to Alor Setar to be with the deceased.

[37] The accused further said, at that moment, upon hearing the snub, he lost all his senses. He said from that moment he did not realise what had actually happened. He said, when he recovered his senses he found the deceased was already on the floor, bleeding and breathless. He decided to return to the restaurant and confessed the crime to SP9. Subsequently, SP9 took him to the police station for him to surrender himself.

[38] The accused did not call any witness to support his unsworn statement from the dock.

[39] As clearly stated in *Balachandran v. PP (supra)*, a *prima facie* case can only be doubted by evidence produced by the defence, sufficient to rebut the prosecution's case. The accused's defence rested purely on an unsworn statement. The question is whether this is sufficient to raise doubt to the prosecution case?

[40] It is instructive at this juncture to state a few words on the effect of an unsworn statement by an accused person. In *Wong Heng Fatt v. PP* [1958] 1 LNS 96; [1959] MLJ 20 at p. 21 Smith J considered the nature of this kind of evidence. His Lordship said:

> I do not consider that statement by an accused from the dock is evidence.

[41] In *PP v. Shariff Kader* [1997] 5 CLJ 463, Hishamudin Yunus J (as His Lordship then was) also considered an accused's unsworn statement from the dock not as an evidence and therefore cannot, of itself, raise any doubt on the prosecution's case.

[42] However in *PP v. Chong Soon Wah* [2008] 9 CLJ 153, however, Azhar Mohammad J (as His Lordship then was) came to a different conclusion and accepted the unsworn statement as an evidence. There were many other cases that accepted unsworn statement from the dock as evidence.

[43] For my part, the better view would be that expressed by Azhar Mohamad J in *PP v. Chong Soon Wah*, above, as to the status of the statement. In my view, the unsworn statement is

A evidence which must be considered. In my view the decision of the Federal Court in *Teuku Nawardin Syamsuar v. PP* [2011] 3 CLJ 353, had made the position very clear and that the only consideration is the weight to be attached to the statement given that the unsworn statement is not subject to cross-examination
B and therefore the truth and reliability of the statement had not been fully tested.

[44] In *Teuku Nawardin Syamsuar v. PP (supra)* Heliliah FCJ said as follows:

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> [15] In the present appeal the appellant had chosen to furnish an unworn statement from the dock and no other witness was called for the defence. The decision in *Mohammed Salleh v. PP* [1968] 1 LNS 80 is useful. In the words of Wee Chong Jin CJ:
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> > In our judgment, the right of an accused at his trial on a criminal charge to make an unworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system
> E of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an
> F express statutory provision to that effect.
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> With regard to the question of prejudice arising out of the trial judge's comment on the probative value of the unsworn statement of the appellant, we are of the opinion that it is
> G proper for a judge in summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case. In the present case the trial judge
> H directed the jury as follows:
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> > Well, members of the jury, that is the case for the prosecution. Now what is the accused's defence to this charge? You must also consider his evidence, or rather you must consider his defence. The accused,
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> as you know, did not give evidence on oath. He made a statement from the dock and he could not be cross-examined by the prosecution, he could not be questioned by me, he could not be questioned by you. Members of the jury, you will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence, because when a man gives evidence one can cross-examine on it and test it and generally have a much better opportunity of assessing it. Of course, you must not reject the statement of the accused, you must consider it and give it such weight as you think it is worth having regard to the other evidence that you have.

> [16] While that case pertains to a trial with a jury nevertheless the guidelines established is still applicable with respect to the probative value to be accorded to the unworn statement that is a judge will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence as there was no opportunity of cross examining him in order to test the veracity of his evidence as opposed to that of the prosecution.

[45] Based on the guidance by the Federal Court which I have quoted *in extenso* in my judgment in dealing with the unsworn statement, the judge or magistrate, in evaluating the evidence, must not brush aside the unsworn statement and proceed to make a finding of guilt on the part of the accused. In my judgment the trial court must consider the accused's defence as contained in the unsworn statement in light of the other evidence tendered by the prosecution. In other words, at the end of any criminal trial the whole evidence produced in the case must be considered in totality. This is clearly required by s. 182 CPC in the case of the High Court trial (s. 173(m) in the case of subordinate court trial). The accused unsworn statement must be considered in totality and together with the whole evidence. It cannot be considered in isolation. In find support for the view that I have stated herein from established authorities. In *PP v. Muhammad Rasid Hashim* [2011] 3 CLJ 424, Abang Iskandar J had the opportunity to consider unsworn statement and made the following observations:

> In order to properly appreciate that unsworn statement made by the accused from the dock (D64) it ought not however, to be considered in isolation. Rather, it must be juxtaposed side by side

A with the evidence led by the prosecution witnesses. In so doing, the court must also consider the inherent credibility or otherwise of such statement as contained in D64. This court must also compare it with the credible evidence led by the prosecution ...

B **[46]** In *Ahmad Faizal Ali Aulad Ali & Ors v. PP* [2009] 9 CLJ 745, Yeoh Wee Siam JC (as Her Lordship was) had, in considering such statement said:

C [113] From the above, it is clear that an accused person has a procedural right to opt to give his evidence for his defence by way of an unworn statement from the dock. However, the accused person would not be subject to cross-examination for such statement made. Therefore, such unsworn statement has to be evaluated by the trial judge and given the weight as the trial judge thinks fit, but the weight accorded cannot be as much as the weight that a trial judge would give to a sworn statement D given by an accused person from the witness box.

[114] In the instant case, the trial judge held that it was difficult to give value to the unsworn statements given by the three appellants from the dock, and she finally decided that she could only give very little weight to such evidence. E

[115] I am of the opinion that the unworn statements from the dock of the three appellants given for their defence do not have much weight, as correctly decided by the trial judge. The trial judge also held that the defence of the three appellants is a mere F denial and, therefore, there was no reasonable doubt raised by the defence to rebut the prosecution's case.

[47] In the present case, counsel for the defence argued the accused had successfully raised the defence of unsoundness of mind at the time of committing the murder. The defence of G unsoundness of mind is provided under s. 84 of the Penal Code which provides:

Section 84. Act of a person of unsound mind

H Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

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[48] The defence of unsoundness of mind is one of general defences provided by Penal Code under s. 84. Once raised, it becomes the duty of the accused to prove his defence as provided under s. 105 of the Evidence Act 1950. In other words the defence bears the legal burden of proving the defence. Section 105 provides:

> **Burden of proving that case of accused comes within exceptions**
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> 105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.
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> ILLUSTRATIONS
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> (a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act. The burden of proof is on A.
>
> (b) A accused or murder alleges that by grave and sudden provocation he was deprived of the power of self control. The burden of proof is on A.

[49] In *Juraimi Husin v. PP* [1998] 2 CLJ 383 the Court of Appeal at p. 422 held:

> We are, on the other hand, entirely in agreement with the submission made by the learned deputy, Encik Azahar, that the burden of establishing the defence of insanity lay upon the first accused (see *PP v. Alang Mat Nasir* (1938] MLJ 153; *Jusoh v. PP* [1963] MLJ 84) and that he had plainly failed to do this.
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> The learned deputy drew our attention to the absence of any cross-examination of the prosecution witnesses on the insanity issue. We were also referred to passages in the evidence-in-chief of the first accused where he clearly explains the premeditation with which the murder of the deceased had been planned and executed. We are in agreement with Encik Azahar that the revelations made by the first accused are the product of a mind uninfected by any illness of any sort.

[50] In *John Nyumbei v. PP* [2007] 2 CLJ 509 the Court of Appeal had stated as follow as regard to a defence of unsoundness of mind:

> 14. When the defence of insanity is raised the court thus needs to consider two matters, namely:
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> (i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and
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> (ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law. (see *Ratanlal and Dhirajlal's Law of Crimes*, 5th edn., p. 289 et seq).

[51] The Court of Appeal further emphasised:

> 12. Thus, under s. 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.
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> 13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s. 84 Penal Code. The species of insanity addressed by s. 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s. 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25 edn. p. 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *PP v. Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

[52] In *PP v. Arokiasamy Alphonso* [2012] 6 CLJ 117 the Court of Appeal had once again restated the principles in considering the defence of unsoundness of mind. Hassan Lah JCA (as he then was) in his judgement held the defence of unsoundness of mind had not been proved.

[53] To my mind, in order to succeed, the accused must produce evidence to prove that he was of unsoundness of mind at the time he committed the offence. In the present case the defence had not produced any evidence that shows he was of unsound mind at the material time. A mere statement in the accused's unsworn statement that he did not realise what actually happened cannot, by any stretch of imagination, amount to evidence to prove he was of unsound mind at the particular time. It is a mere statement. Nothing more!

[54] As I had stated earlier there is no doubt the accused had stabbed and slashed the deceased. Having relied on the defence of unsoundness of mind as submitted by counsel for the defence, the defence needed to lead evidence to prove the status of the accused's mental capacity at the time when he stabbed and slashed the deceased. Looking through the evidence in this case I could not find an iota of such evidence.

[55] It is true that in this case the accused was send to Hospital Bahagia Tanjung Rambutan for observation of Psychiatrist, pursuant to an order by the court upon an application made by the defence counsel, before the trial started. He was examined by a psychiatrist who had issued a certificate confirming the accused to be sane at the time of commission of the offence. This certificate was never produced to become an exhibit by the prosecution. The court may take judicial notice on the existence of the certificate as it was issued in pursuant to the court's order for the accused to be examined by a psychiatrist. In my view, nothing turns upon the failure to produce the certificate, since as stated earlier the defence bears the legal burden of proving the defence of unsoundness of mind and in my judgment this cannot be effectively proved by merely relying on the non-production of the certificate for that would amount to saying that as the prosecution had failed to prove that the accused is of sound mind therefore he must be of unsound mind. Such an argument is based on perverse logic.

[56] Having considered the accused's unsworn statement, I am of the view that his statement does not possess of high quality evidence to be said to have succeeded in raising doubt to the prosecution's case. In my view the statement revealed that he had committed the act of causing death to the deceased. In

considering the weight to be attached to the statement I had considered the fact that the accused was not subjected to cross-examination by the prosecution. Without being tested in cross-examination I found the statement of the accused that he could not realise anything subsequent to being spurned by the deceased to be hollow, devoid of any substance.

[57] I must also reiterate that the defence of unsoundness of mind was only raised through his statement without any other evidence to support it. I found on the totality of evidence, the accused had failed to prove his defence of unsoundness of mind. Furthermore, having the benefit of audio visual and having observed the conduct of the accused during the entire trial, I do not for one moment think that the accused could be suffering from an unsoundness of mind. On the contrary, the accused, in my observation, was lucid at all times during the trial.

[58] In subjecting the entire evidence to a maximum evaluation I had also considered whether through the unsworn statement of the accused a defence of sudden and grave provocation can be established. Although it has never been raised and argued by the defence, I consider this approach that I am taking is permissible in view of my duty of undertaking a maximum evaluation of evidence although I must hasten to add that I am not saying that this approach must be undertaken by a trial court. In the present case, the sudden and grave provocation could be raised as a result of the deceased's refusal to proceed with their plan of getting married. Her refusal could have provoked the accused to stab her. This defence is provided as exception under s. 300 of the Penal Code. If this defence is successfully proved, the act of causing death will only become an offence of culpable homicide not amounting to murder punishable under s. 304 of the Penal Code.

[59] It cannot be gainsaid that the accused had to prove this defence also. Unfortunately in the present case, I found the accused's unsworn statement was not enough to prove the defence. A mere refusal to go through with the planned marriage, in itself, will not, in my judgment constitute a grave and sudden provocation. The refusal may have provoked a reaction from the accused but not to the extent of committing a murder. It may require something more serious to turn that spurn into a provocation.

[60] For the foregoing reasons I found the prosecution had proved the case against the accused beyond reasonable doubt. I therefore found the accused guilty as per the charge and convicted him for an offence punishable under s. 302 of the Penal Code. Accordingly the only sentence available is death as provided under the section and I so order.